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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California,

Petitioner,

against

LOUIS NELSON, Warden,

Respondent.

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

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Interest of *Amicus*

The Attorney General of the State of New York represents the respondent State custodians in all habeas corpus actions including those brought in the Federal courts by New York prisoners. Moreover, as the chief legal officer of the State (New York Executive Law, § 63), he represents the State offices, officers and employees who would be potential subjects of discovery orders if the Federal Rules of Civil Procedure were held to give habeas corpus applicants the power to demand information on which to base their attacks on official State Court judgments.

Because of this dual responsibility and because the extension of the Federal Rules for discovery to habeas corpus applications would profoundly affect the fundamental nature of the writ, the New York Attorney General files this brief as *amicus curiae* pursuant to Rule 42 of the Rules of this Court.

The brief of the California Attorney General thoroughly disposes of petitioner's claim that Rules 1 and 81(a) do not effectively preclude application of the Civil Rules regarding discovery to habeas corpus proceedings. We therefore join in that brief and adopt its erudite arguments. In this brief, we place our principal emphasis on the policy considerations which make discovery undesirable in habeas corpus and those which militate against the invocation of the Court's inherent power to enable the parties to examine each other and third persons without the supervision of that Court.

Summary of Argument

The position of the New York Attorney General does not stem from any fear that the use of the civil discovery procedure will expose secret, embarrassing or damaging information nor that its use will open wide our prison gates. Nonetheless, we feel that making discovery, as described in the Federal Rules of Civil Procedure, available on habeas corpus would encumber and delay this plenary and hopefully speedy proceeding and would impose considerable burdens on the Court, on respondents and on potential witnesses, both public and private.

Of course, those burdens could be borne, if such discovery were necessary to enable an applicant to substantiate a good faith constitutional claim against his State conviction. However, the flexibility in kind and in scope of the hearing provided in habeas corpus proceedings is all that is required for a full and fair consideration of such claims. Therefore, the Federal Rules of Civil Procedure for discovery are as unnecessary in habeas corpus cases as they would be cumbersome.

Habeas corpus applications in the Federal courts attacking prior State judgments typically are made after a post-conviction proceeding in the State courts where the applicant has had an opportunity to attack the original judg-

ment collaterally. Therefore, all relevant information or all sources of such information are known to the applicant before he initiates the Federal proceeding. Furthermore, an applicant must delineate his constitutional claims and their factual basis before Federal jurisdiction attaches, there being no presumption of unconstitutionality merely because he has been convicted of a crime. Thus, since such claims are a necessary precondition of federal jurisdiction, discovery would not aid in defining the issues. Once defined, if the claims are sufficient on their face to warrant the issuance of a writ, the flexible plenary hearing provided in habeas corpus cases is promptly available, obviating applications for discovery, protective orders and all the procedural appendages of the Civil Rules relating to discovery.

Pre-trial discovery is not an essential of habeas corpus procedure. What is required in the first instance is an efficient method for sorting out non-meritorious claims and for disposing of them speedily and with finality. In the second place, habeas corpus requires that there be a forum for a full and fair exploration of the meritorious contentions. The use of discovery as provided for in the Civil Rules would seriously impair the speedy disposal of non-meritorious claims while unnecessarily formalizing and limiting the broad fact finding power of the Court in hearing the meritorious contentions.

POINT I

The discovery provisions of the Federal Rules of Civil Procedure are inapplicable in a habeas corpus proceeding and inconsistent with its nature and purposes.

When a state prisoner applies to the federal courts for a writ of habeas corpus he initiates perhaps the most unique proceeding presently provided by law. He correctly labels his proceeding civil, but he is concerned with

the criminal process. He initiates an original cause of action, but he seeks to review prior judicial proceedings. He invokes federal rights in a federal court, but, in fact, the issue is the validity and sufficiency of state statutes, judgments and procedures.

Habeas corpus has judicially evolved from a technical writ to a full-scale collateral examination of the validity of state judgments by the federal courts. As such, it relies heavily on state court records. To the extent that it examines the proceedings leading to conviction it often traverses the same ground covered in the state court. To the extent that comity requires that the state courts have the first opportunity to re-examine their judgments, it must traverse those same issues. And to the extent that the jurisdiction of the federal courts rests on their duty to relieve unconscionable custody, habeas corpus must be a speedy summary proceeding designed for expeditious assessment of the issues and granting of relief.

Procedures governing habeas corpus are found in Judiciary Law, 28 U.S.C. §§ 2241-54 (hereinafter the habeas corpus statute) which was most recently amended in 1966 (Pub. L. 89-711, Nov. 2, 1966). These procedures reflect the Constitutional basis of the writ, Article 1, § 9 and the Fourteenth Amendment. Decisional law of this Court has been extremely important in defining the nature and procedures of habeas corpus. In 1963 this Court revolutionized the practice and procedure of the federal writ substantially extending its availability to state prisoners. *Townsend* v. *Sain*, 372 U. S. 293; *Fay* v. *Noia*, 372 U. S. 391.

The Federal Rules of Civil Procedure, on the other hand, were designed for original plenary civil actions and thus are in large part inappropriate to the peculiarities of habeas corpus. In the instant case, petitioner suggests a number of sources of habeas corpus procedures to support

his argument that the liberal discovery available in plenary federal civil cases (Federal Rules of Civil Procedure, Rules 26-37) is also available in habeas corpus. However, in the original service of interrogatories and in petitioner's argument to the Court of Appeals, the sole basis of authority alleged was the Federal Rules. Petitioner's brief in this Court recognizing the weakness of that claim, relies in the first place on the decisional law of this Court (*Townsend* v. *Sain, supra; Brown* v. *Allen,* 344 U. S. 443), in the second, on the inherent power of the District Court in aid of its jurisdiction, in the third, on the "All writs" statute (28 U.S.C. 1651) and only as a last resort, on the Rules of Civil Procedure. It ignores the basic source for the procedural framework of habeas corpus, the statute. See *Holiday* v. *Johnston,* 313 U. S. 342, 353.

The brief for *Amicus curiae,* the National Association for the Advancement of Colored People, Legal Defense and Education Fund, Inc. and the National Office for the Rights of the Indigent (hereinafter Legal Defense Fund) criticizes the habeas corpus statute for not containing the pre-trial and trial procedures which make up the bulk of the Federal Rules (L.D.F. brief, p. 7). This freedom from procedural bulk is precisely what makes habeas corpus a flexible, efficient, summary mechanism for redressing extraordinary grievances.

Professor J. W. Moore has stated generally:

> "The Federal Rules were primarily designed for plenary litigation, and cannot, therefor, be wholly applicable to proceedings which are summary in nature." *Moore's Federal Practice,* 1.03 [1] (2nd ed. 1967)

The Civil Rules relating to discovery are an excellent example of a procedure which is necessary and effective in an original plenary action but which would interfere with the prompt and effective operation of a summary proceeding.

The Civil Rules wisely take into account the peculiarities of the writ of habeas corpus and specifically exclude habeas corpus proceedings from their general coverage, excepting only habeas corpus appeals. Federal Rules of Civil Procedure, Rules 1 and 8(a).

The decision of the Court below and the California Attorney General's brief in this Court demonstrates that this textual exclusion is determinative against petitioner's claim. The District Court's order was based only on a finding that interrogatories under Rule 33 were available to a habeas corpus applicant. No other authority was necessary and the Court did not find that the order was justified by reason of its inherent power in aid of its jurisdiction by the decisional law of this Court or by the "All Writs" statute.*

Petitioner's principal judicial authority is not *Townsend* v. *Sain, supra; Fay* v. *Noia, supra,* and the progeny thereof but, curiously, on *Brown* v. *Allen, supra,* since a footnote in the opinon of Mr. Justice Reed stated *inter alia:*

> "Of course, the other usual methods of completing the record in civil cases, such as subpoena duces tecum and discovery, are generally available to the applicant and respondent. If useful records of prior litigation are difficult to secure or unobtainable, the District Court may find it necessary or desirable to hold limited hearings to supply them where the allegations of the application for habeas corpus state adequate grounds for relief." (*Id.* at 464, n. 19.)

Needless to say, *Brown* v. *Allen* no longer provides the procedural framework for federal writs of habeas corpus. It has been superseded and directly overruled by *Town-*

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* We do not treat petitioner's claim under the "All Writs" statute since this argument has been adequately answered by the brief of California Attorney General in which we join.

send, supra at 312-313. In any event, footnote 19 was dictum and the reference to discovery a casual afterthought. The footnote refers to habeas corpus statutory provisions regarding the obtaining of evidence and its effect was to limit the occasions wherein a factual hearing was required. This is the aspect of *Brown* v. *Allen, supra,* which was specifically overruled by this Court in *Townsend, supra.* The footnote is part of only one of the seven opinions in that case, there being no majority.

This Court's description of habeas corpus in its subsequent opinion in *Townsend* v. *Sain, supra,* is inconsistent with the use of discovery in habeas corpus. In the first place, it puts great responsibility for formulating the issues and ascertaining the facts upon the District Court (*id.* at 316-319), while discovery is a tool of a truly adversary proceeding wherein the parties must formulate the issues and ascertain the facts with as little supervision from the Court as possible. Second, the opinion in *Townsend* v. *Sain, supra,* thoroughly describes procedures for handling issues in habeas corpus, but contains no hint that discovery can be used. This omission cannot be attributed to inadvertence or irrelevance, since discovery is a matter of such importance that it is not easily overlooked. *Hickman* v. *Taylor,* 329 U. S. 495, 500. That aspect of the decision which specifically discussed the power of the District Court to compel the production of evidence would have been unnecessary if the parties had available the particular discovery enacted by the Rules. Since the purposes of the opinion in *Townsend* was to ". . . provide answers for all aspects of the hearing problem for the lower federal courts . . ." (*id.* at 310), it would have been a disservice to the Courts and litigants which have relied on it to have inadvertently omitted references to this significant evidence-gathering machinery.

Thus, contrary to the assertion of petitioner, *Townsend, supra,* is not independent authority for the use of dis-

covery in habeas corpus proceedings; but actually describes a system which is inconsistent with the use of discovery.

The habeas corpus statute does not provide for discovery either directly under the Civil Rules or by analogy to the Rules, although it contains references to other provisions of the Federal Rules. See e.g., 28 U.S.C. 2242 (regarding amendment and supplements to applications). The statute also has created specific alternatives to formal discovery on habeas corpus.

The form of evidence to be used in habeas corpus proceedings is governed by 28 U.S.C. § 2246, which provides that on an application for a writ of habeas corpus "evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." Nowhere does the statute permit depositions for discovery purposes. In *Sullivan* v. *United States,* 198 F. Supp. 624 (S.D.N.Y. 1961), Judge Murphy held that the omission of any reference to discovery from § 2246 prohibited its use in habeas corpus and refused to allow petitioner to serve written interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure, stating:

> "The provision for deposition evidence in the first sentence of that statute relates, again, not to discovery depositions (which may be oral or by interrogatories) but to depositions intended to be used as testimonial evidence at a hearing upon the habeas corpus application. The deposition contemplated is that of a specified witness upon an open commission." *Id.* at 626.

Section 2246 is irrefutable evidence that Congress did not intend that the Federal Rules regarding discovery should apply in habeas corpus. If it were intended that the Federal Rules relating to discovery applied in habeas corpus there would have been no need to enact § 2246 in 1948 since the subject of that section, evidentiary depositions, had already been embodied in Rule 26 of the Federal Rules.

Congress has provided another alternative to discovery on habeas corpus by creating an independent affirmative duty of disclosure on the part of the respondent:

> "On application for a writ of habeas corpus . . ., the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment . . ." (28 U.S.C. § 2249.)
>
> "(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
>
> "(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding." (28 U.S.C. § 2254[e], [f].)

If the broad discovery provided by the Federal Rules of Civil Procedure directly applies to habeas corpus or applies as part of the Court's inherent power, there would have been no need for requiring respondent to produce those records. At the very least, some provision would have been made to prevent duplication of methods of production.

The importance placed upon a swift determination also indicates Congress' intent that habeas corpus proceed without the interruption of civil discovery. The habeas corpus timetable is as follows:

> "The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> • • •
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> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
>
> • • •
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." (28 U.S.C. § 2243)

Since the availability of the writ has been so dramatically expanded in recent years, good cause frequently is shown for a greater time for preparation for a habeas corpus hearing. Nonetheless, when the statute was amended in 1966 (Pub. L. 89-711, November 2, 1966), the time limits of 28 U.S.C. § 2243 remained intact. They certainly are inconsistent with the use of discovery and indicate a strong public policy favoring a direct speedy and summary disposition of these cases. Finally, in the 1966 amendment to Section 2254, Congress detailed its requirement that evidence must be offered in a state court before application for habeas corpus is made, thus envisioning a situation in which discovery would be of very little practical value.

Both petitioner and the Legal Defense Fund seem to place principal reliance on their argument that petitioner could compel respondent to answer certain interrogatories because of the inherent power of the District Court in aid

of its jurisdiction. As has already been noted, there has been no such reliance in the instant case.

In any event, discovery is not a power of the Court. Federal Rules 26 through 37 govern the relationship of the parties to each other, defining their rights and duties to obtain and disclose information. The Rules do not deal with the right of the Court to compel production of evidence. Applications for discovery are served on the parties whose duty it is to formulate and define the issues by using this pre-trial procedure. The Court intervenes only when a dispute between them arises. Rules 30(d), 33, 37.

In habeas corpus cases, the traditional power of the Court is made explicit. The respondent is required to produce specific information. 28 U.S.C. § 2249, § 2254. The Judge has a duty to hear all relevant facts and make a determination based on them. *Townsend* v. *Sain, supra.* If these powers were not explicit, they might well be inherent to the essential judicial function of a District Court in habeas corpus.

If petitioner does not succeed in his reliance on the Federal Rules of Civil Procedure and thereby on the nominal designation of habeas corpus as a civil proceeding, there is no basis for the invocation of the Court's inherent power. The factual issues in such cases have previously been presented to a State criminal court. The federal discovery rules were not available to petitioner there, nor could he invoke them in a collateral civil proceeding in the State courts. In fact, the liberal discovery of the Civil Rules is not available even in federal criminal cases.

If, while presumed innocent, a defendant does not have these evidence-gathering tools, they certainly cannot first be utilized on collateral attack when the presumptions are against his claims. It would be as if there was very limited pre-trial discovery in civil cases, but wide-open discovery for the first time by way of a motion for a new trial. It would be a warped procedural system which encouraged

the withholding of claims and the continual rehashing of its previous cases.

Petitioner's argument would be more logical if he claimed inherent power to require full discovery in original criminal proceedings. However, the federal government has deliberately adopted a limited range of discovery in criminal matters. See Rule 16, Federal Rules of Criminal Procedure and notes of the Advisory Committee On Rules thereon. The procedure adopted for that limited discovery is not modeled on the Civil Rules. The parties must apply to the court for permission to inspect the documents for which discovery is available. Rule 16(f) specifies that all requests for discovery should be made promptly and in one motion.

Of course, legislation cannot deprive a court of the essence of its judicial power, that *sine qua non* without which a court cannot function, but District Courts may invoke this power only with relation to limited and traditional functions. *Michaelson* v. *United States,* 266 U. S. 42. This is not the inherent power to which petitioner refers. Petitioner uses "inherent power" as a convenient phrase for requesting this Court to legislate detailed rules of procedure for all habeas corpus cases in deciding this case in controversy. In *Miner* v. *Atlass,* 363 U. S. 641, on a claim directly analogous to that made in the instant case, this Court refused to hold that discovery under the Federal Rules of Civil Procedure was applicable to admiralty proceedings. A much stronger argument for the use of the Rules was made there, since the representatives of the deceased seaman were bringing an original action very much like a civil negligence case in which the Civil Rules would apply. Like plaintiffs in such actions, they might be deprived of access to much relevant information unless there was some way to compel disclosure by respondents. Yet this Court held:

> "The problem . . . is one which peculiarly calls for exacting observance of the statutory procedures sur-

> rounding the rule-making powers of the Court . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Id.* at 650.

Petitioner's simplistic suggestion that discovery by the parties inheres in the District Court's jurisdiction would have obviated the need for the enactment of Rules 26 through 37 which has been hailed as one of the major accomplishments of the Federal Rules of Civil Procedure. *Hickman* v. *Taylor, supra* at 500. Petitioner's argument would hold that these rules are unnecessary surplusage, for broad discovery would be available without statutory authorization by reason of the inherent power of the Court. The implication is that future amendment would be a function of the individual District Courts over which the Legislature would have little control. Such an extension is obviously not contemplated and the argument for invocation of the inherent power of the District Court essentially is one for the desirability of discovery of some sort in habeas corpus proceedings (LDF Brief pp. 8, 20). Note, *Civil Discovery in Habeas Corpus,* 67 Colum. L. Rev. 1296, 1304 (1967). This is, of course, a matter for the Legislature.

This Court has a quasi-legislative function with regard to approving the Federal Rules. However, rules are not enacted by decisions of cases in controversy, but must be approved by Congress. 28 U.S.C. § 2072 (1964). Even this limited participation of the Court has been criticized as a violation of the doctrine of separation of powers. Members of this Court have found that procedural rules frequently create substantial rights the responsibility for which should reside in the legislative branch. 374 U. S. 865, 866-68 (Dissent of JJ. Black and Douglas to the Transmission of the Federal Rules of Civil Procedure).

Nonetheless, since this is a case of first impression, it should not be considered in a vacuum and we endeavor in Point II, *infra*, to discuss the policy considerations which would be presented to a legislative body which was deciding whether or not to provide procedures for discovery in federal habeas corpus.

POINT II

The unique and flexible hearing provided for habeas corpus cases is sufficient to provide full and fair disclosure of relevant facts without the superimposition of a discovery procedure neither designed nor appropriate for use in a summary proceeding.

Petitioner's basic premise appears to be that the application of the discovery provisions of the Federal Rules of Civil Procedure to a habeas corpus proceeding is desirable in order to provide access to information not otherwise obtainable and, presumably, to provide that information more efficiently than existing procedures. This position rests on theories and abstractions which have no meaning once confronted with the real world of habeas corpus. Liberal discovery superimposed on the liberal habeas corpus procedure would not promote but would hinder the effectiveness of habeas corpus. The nature of the petition, of the inquiry, of the subject matter and of the relief are unique. Congress and the Courts, recognizing this, have designed procedures to implement the aims of habeas corpus. Far from assisting those ends, the discovery rules would, at best, provide the same information and, at worst, encumber and delay the disposition of claims. In habeas corpus, discovery procedures would be seriously abused and would result in intolerable harassment of potential witnesses.

The great volume of habeas corpus petitions creates two concomitant requirements—that non-meritorious claims be

culled out as early as possible and that meritorious claims be considered as swiftly and completely as possible. Typically, this process divides petitions into three categories. First, are those petitions which on their face are without merit or not ripe for federal adjudication, second, are those petitions which can be disposed of by reference to available state records, and third, are those petitions which require an evidentiary hearing.

Discovery rules are not useful in the first type of petition. Yet under their terms, they would be applicable (Rule 26). The second type of petition forms the bulk of habeas corpus applications. Those require resort to trial minutes, voir dire minutes, minutes of hearings on suppression of evidence, on voluntariness of confessions, on lawfulness of identifications, minutes of plea and sentence, motions to withdraw pleas, motions for change of venue, motions for new trial, grand jury minutes and the myriad records, notations, statements, documents and briefs relevant to a particular claim. All of these documents are available without discovery. 28 U.S.C. § 2249, § 2254. If unavailable because they are, for example, confidential, they would be unavailable through discovery rules.

It was for the third sort of case that this Court enunciated specific standards in *Townsend* v. *Sain, supra* at 317. The standards for a judge to follow and the duties which that opinion imposed upon him insure that every bit of relevant evidence which properly should be admitted in a habeas corpus proceeding will be introduced. If the District Judge fails in this duty, petitioner has a right to claim on appeal that he did not have a full and fair hearing as required in such cases. See *Townsend, supra.*

In appearing in virtually all of the habeas corpus cases before the federal courts in New York State, it has been the experience of this office that the District Judges take this mandate extremely seriously and require all relevant testimony and documents often before they decide on the sufficiency of a claim.

A. Discovery Has Been Used in Habeas Corpus Only in Rare Instances and Its Absence Has Been no Impediment to Full and Fair Consideration of the Allegations of State Prisoners.

Petitioner has made no showing that the absence of discovery has been detrimental to the rights of applicant Arthur Walker. Indeed, although there is no history of discovery having been widely used in habeas corpus cases (but see statement in LDF brief p. 27), no case has been cited which demonstrates that any petitioner has ever been deprived of essential information because of the unavailability of discovery.

In *Roberts* v. *Nelson,* October Term, 1967, No. 1407 Misc., a case pending on certiorari to another Ninth Circuit decision, the habeas corpus applicant sought the deposition of an important witness against him at trial. The Court held that these were evidentiary depositions and could be taken. It denied the applicant's allegation that the Federal Rules of Civil Procedure regarding discovery applied to habeas corpus. *Wilson* v. *Weigel,* 387 F. 2d 632 (9th Cir. 1967). Even though that case involves the special situation of a prisoner condemned to death, there was no showing that deposition before the hearing was warranted. The applicant makes an unsupported statement that the prosecutor coerced the testimony of this important witness. This same allegation was made at trial and the witness was thoroughly cross-examined. On the basis of the record before this Court there is no showing of the necessity of evidentiary depositions, let alone, discovery.

There are habeas corpus cases cited in petitioner's brief and that of the Legal Defense Fund which purportedly illustrate the use of discovery under the Federal Rules. *Fortner* v. *Balkcom,* 380 F. 2d 816 (5th Cir. 1967); *Molignaro* v. *Dutton,* 373 F. 2d 729 (5th Cir. 1967); *Rodgers* v. *Bennett,* 320 F. 2d 83 (8th Cir. 1963); *Sullivan* v. *Dick-*

son, 283 F. 2d 725 (9th Cir. 1960); *Schiebelhut* v. *United States,* 318 F. 2d 785 (6th Cir. 1963); *United States ex rel. Seals* v. *Wiman,* 304 F. 2d 53 (5th Cir. 1962); *Knowles* v. *Gladden,* 254 F. Supp. 643 (D. Ore. 1965), subsequent history in 378 F. 2d 761 (9th Cir. 1967); *Harris* v. *North Carolina,* 240 F. Supp. 985 (E.D.N.C. 1965); *Smith* v. *United States,* 174 F. Supp. 828 (S. D. Cal. 1959). Of these nine cases, it was respondent who sought discovery in six. *Fortner, supra; Molignaro, supra; Schiebelhut, supra; Knowles, supra; Harris, supra* and *Smith, supra.* In *Rodgers, supra* discovery had not been used. In remanding for a hearing the Circuit Court as dictum merely stated that discovery under the Civil Rules was available but there was no indication of the particular use to which it might be put. In *Sullivan* v. *Dickson, supra,* petitioner sought by means of a subpoena *duces tecum* the medical record of the complainant in one of his convictions for rape. The Court held that he could not examine those documents unless there was a pending proceeding. Although the Court suggested that if a hearing were granted he would be able to take depositions of the doctor who had possession of the documents, in any event, petitioner could call him as a witness and subpoena the documents.

In *Seals, supra,* petitioner claimed that there had been racial discrimination in the selection of the jury that convicted him in Mobile County, Alabama. Petitioner requested admissions of the State Attorney General with regard to facts already ascertained. Petitioner not only had relevant information, but he possessed exhibits attached to the request, which could have been introdued at a hearing.

In the Federal District Courts sitting in New York, it has been our experience that only one attempt to use discovery under the Civil Rules has been made. That occurred in a case which is presently pending before the United States District Court for the Southern District. *United States ex rel. Raymond Figueroa* v. *McMann* (File

68 Civ. 235 [S.D.N.Y. 1968]). Figueroa claims that his plea of guilty was coerced by the lack of effective assistance of counsel. Before ordering a hearing, the Court appointed counsel "to obtain competent affidavits from his [petitioner's] mother and his lawyer concerning the facts of the allegedly erroneous advice". Counsel's first step was to serve notices to take depositions of an Assistant District Attorney concerning the facts relating to the arrest, arraignment, plea and sentence and of an employee of the local probation department concerning petitioner's probation report. Laying aside the question of limitation by reason of the direction of the Judge, it is clear that the officials from whom depositions were sought could have been called as witnesses at a hearing if they had any relevant information. Furthermore, most of the significant details from official sources were already part of the record in the State Court proceeding.

In none of the foregoing cases, nor in any which has been brought to our attention has the petitioner been prevented from obtaining relevant evidence because of the unavailability of discovery under the Federal Rules of Civil Procedure.

In the instant case applicant Walker obviously wanted the information in order to investigate the version of the claims which he expected the police officer to make.* However, there is no reason why he could not have put the

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* On the basis of the record in the instant case which does not include the minutes of trial, it is not clear to what extent the evidence sought from the Warden is different from that obtained on cross-examination of the police officer at Walker's trial. Even if the information is different, it is not clear why the officer was not so questioned at trial. Furthermore, it certainly is not clear that the allegedly new evidence presented by affidavit on the instant application had ever been presented to the state courts. However, because the propriety of holding the hearing is not before this Court, we assume that such evidence could be introduced, is relevant and if it is a surprise to Walker, he should have a chance to refute it.

officer on the stand at the hearing. If the testimony was such that an investigation was necessary, an application for an adjournment could have been made and would, no doubt, have been granted. In an ordinary case there would be relatively little loss of time by using this method.

As the Court below indicated, the Warden to whom the interrogatories were addressed did not have personal knowledge of the relevant events and thus the interrogatories were not evidentiary. *Wilson* v. *Harris,* 378 F. 2d 141, 144 n. 5. However, the applicant was well aware that the primary source of the information was the arresting officer, Sgt. T. Hilliard (App. 34-35). He was a necessary witness at the hearing whether or not discovery was allowed. Therefore, the question of obtaining sources of information by means of discovery is not raised in the instant case.

Although difficult to imagine, if such a case were to arise, the habeas hearing procedure is flexible enough to allow the Judge to require disclosure of the sources of relevant information. It is important to remember that a habeas corpus hearing is not before a jury nor does it have the evidentiary strictures of a trial before the Court. Therefore, tangential examination is possible and, in fact, not unusual.

The power of compulsory production of evidence at a habeas corpus hearing lies within the discretion of the Judge (28 U.S.C. § 2254; *Townsend, supra* at 318-19), while the responsibility for discovery is placed on the parties by the Federal Rules of Civil Procedure. The fact that the power and duty to compel evidence resides in the Judge insures the fastest possible production of relevant information, because when the proceedings begin the applicant almost universally is not represented by counsel. Furthermore, complete cooperation can be expected from respondent and other persons associated with the state prosecution both because of their duty under the statute and the re-

striction against suppression of evidence by the prosecution. *Brady* v. *Maryland,* 373 U. S. 83. Of course, the habeas applicant does have the right to subpoena and to take evidentiary depositions for use at any hearing.

Legal Defense Fund suggests that discovery may be useful to clarify the allegations of the *pro se* applicant (p. 13). Even apart from the delay which this would engender, discovery seems a round-about way to discover what an applicant means and discovery cannot be substituted for the jurisdictional requirement of factual allegations by the applicant. If the applicant is unrepresented by counsel, his own use of discovery would not help the situation. If the Court cannot understand the application, counsel may be appointed to clarify the claim. Certainly discovery will not help counsel determine what the claim is. The appointment of counsel for clarification was done in the instant case and was the purpose of the appointment in the *Figueroa* case, *supra.*

Of course, discovery is a tool of both the defendant and the plaintiff. It usually is a much more important tool for the defendant. See *Fortner, supra; Molignaro, supra; Schiebelhut, supra; Knowles, supra; Smith, supra.* The Federal Rules of Civil Procedure themselves make some distinction between the parties. Rule 26(a) provides that a defendant may take depositions without leave of the Court within twenty days after the commencement of the action while the plaintiff must seek leave of the Court in order to serve depositions within that period. The Advisory Committee in its notes on that rule stated that this section ". . . protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection."

The only unknown fact in a habeas corpus application usually is the state prisoner's own version of the denial of his rights. Usually unrepresented by counsel the state-

ments often need clarification before the state can respond. Also while the state had to go forward to prove the prisoner's guilt, his version of the underlying facts has often not been on the record. Finally, it has been our experience that many claims are lightly and even perjuriously made. Therefore, it is true that discovery would be particularly useful to respondent to fully explore petitioner's factual claims and the context in which they were made. However more efficient, direct and expeditious methods would accomplish the same purpose. Whatever the needs of respondent, neither the argument of, nor the cases cited by, petitioner demonstrate that discovery is a useful tool for habeas corpus applicants.

B. The Statutory Purposes for Which Discovery Was Designed Are Not Relevant to the Flexible Summary Habeas Corpus Proceeding.

The briefs of both petitioner and the Legal Defense Fund, as well as the commentators on which they rely (petitioner's brief p. 24, LDF brief pp. 16-17), recognize that even if discovery were applied to habeas corpus it would operate differently from the way it operates in civil proceedings. However, any proposed change envisions statutory amendment rather than the application of the existing law.

Perhaps the most frequently suggested change is that discovery ought not to be allowed until after a hearing has been ordered. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies, Tentative Draft, Jan. 1967, pp. 68-71. Hon. James M. Carter, *Pre-Trial Suggestions for Section 2255 Cases,* 32 F.R.D. 393, 396-7 (1963).

Certainly to this extent the authorities are correct. It would create an unnecessary burden on the District Court and respondent if discovery were available before the Court had determined whether the contentions have merit and/or

are ripe for consideration. In that event, discovery would be of no use on motions for summary judgment which is one of its primary advantages in ordinary civil litigation. 4 Moore's Federal Practice, *supra* ¶ 26.02 [4] at p. 1040. While there is no motion for summary judgment in habeas corpus the Court's decision whether or not to hold a hearing serves an analogous function.

The basic function of discovery is the formulation and narrowing of issues for trial. *Hickman v. Taylor, supra,* at 501. However issue formulation is of much less significance in habeas corpus proceedings than in ordinary civil litigation. The relationship of the parties refers to a specific conviction in a specific court and claims are made in the context of a finite number of well known constitutional claims. Moreover the District Judge has a peculiar role in formulating those issues. His initial decision on whether or not to hold a hearing performs that function, rather than its being performed by the adversary parties as in ordinary civil litigation.

The great pragmatic benefit of the discovery procedure in civil cases has been to limit the number of witnesses at trial, decrease the length and number of proceedings which take court time and, in fact, to settle many cases out of court. These advantages would not accrue at all in habeas corpus proceedings.

Needless to say, settlement is not a feasible objective of a habeas corpus case. The issues on habeas corpus are already limited and the necessity of taking testimony is reduced by the liklihood of prior procedures in the state courts. Furthermore, the Judge must hear all relevant evidence. Thus, discovery would tend merely to duplicate testimony that would have to be introduced at a hearing in any case.

In addition to the waste of time that this would involve, it also would impose an unfair burden on witnesses. Let us take, for example, Mae Coleman, the witness whose dep-

osition was sought in *Roberts* v. *Nelson, supra.* At the time of the murder, undoubtedly she was interviewed several times by police officers, she may well have testified before a Grand Jury, she was examined and cross-examined at great length during trial, in such a case she might have testified in a state habeas corpus proceeding, and she will have to testify at the federal habeas corpus proceeding. This can be an excessive burden on a private citizen, a judge, a District Attorney, a former official or even a victim of painful crime. Worst of all, this burden would serve no useful purpose. Because evidence will have to be repeated at a habeas corpus hearing, there is no distinct advantage to having it presented outside the hearing of the court which has the duty to discover all relevant facts.

Another objective in creating the federal discovery rules was to reduce the importance of gamesmanship in trials. *Hickman* v. *Taylor, supra,* at 501, *United States* v. *Proctor & Gamble Co.,* 356 U. S. 677, 682. This was an outgrowth of the adversary nature of civil litigation. There never has been a sporting theory in habeas corpus. There is no statute of limitations and no *res judicata* rule. There are few formal requirements for pleadings and there are flexible standards for holding flexible hearings and an extraordinary limited waiver rule. The very essence of the "game" is eliminated with the abolition of definite procedural rules.

Habeas corpus proceedings are not in the control of adversary parties to the extent that civil litigation is. Indeed, in many ways, the parties are not true adversaries. Attorneys for the respondent Wardens have quasi-prosecutorial functions and thereby inherit a constitutional duty to disclose information which would aid petitioners. In addition, there are the statutory requirements of disclosure discussed above. Actually, the essential function of discovery is to create a duty of disclosure of evidence in the other party, because without such a statutory duty his

natural adversarial interest would be to keep such evidence hidden. In habeas corpus, the respondent already has that duty. Habeas corpus petitioners thus would gain no substantial benefit from the availability of discovery.

The preservation of testimony which might be lost if a witness were to become unavailable or were his memory to fade is another advantage gained from the use of discovery under the Rules. This important function serves only if the delay before the hearing or trial is substantial. Such a delay would be entirely inappropriate and unlikely in a habeas corpus case (28 U.S.C. § 2243). In many such cases, the witness' testimony is already preserved. Furthermore, preserving a witness' memory is only possible if discovery occurs at a time proximate to the primary events which are the subject of his testimony. This is not the case on habeas corpus, since applications are brought after the judgment of conviction becomes final. Since there is no statute of limitations, it is likely that the application for habeas corpus is made long after the state proceedings and certainly long after the underlying criminal occurrence.

With respect to the use of discovery procedures, habeas corpus is functionally more like an appeal than an original criminal action. *Wilson* v. *Harris, supra.* Rule 27(b) of the Federal Rules of Procedure makes specific reference to the use of discovery pending appeal, limiting it to depositions taken for the purpose of perpetuating testimony. See *Richter* v. *Union Trust Co.*, 115 U. S. 55. This is the use to which discovery was limited in habeas corpus by the Ninth Circuit in *Wilson* v. *Weigel, supra.*

C. The Factors Which Limit the Abuse of the Discovery Rules by Civil Litigants Would be Ineffective in Habeas Corpus Cases.

Discovery gives the parties a great deal of power which might be used for harassing an adversary. There are in-

stances of its being used to that end. Note, *Tactical Use Of And Abuse Of Depositions Under The Federal Rules.* 59 Yale Law Journal 117ff. (1949) However, that power is probably not used to annoy very frequently because there is little advantage to be gained. The parties seeking discovery pay most of the costs. It has been noted that inequality of resources among parties to civil litigation has led to abuse by the party to whom the costs are negligible as against those who are less well off. 59 Yale Law Journal, *supra* at 127-31.

Nonetheless, litigation of all sorts may give rise to an irrational desire to burden and persecute one's adversary, without regard to the expense. However, counsel usually is able to provide a cool head and restraining hand in order that parties act rationally in their own interest. In other words, the greatest deterrence against abuse is rationality on the part of the parties.

Neither of these limiting factors would offer much hope of controlling abuse of the discovery power in habeas corpus. Costs would not be a deterrent for the paradoxical reason that the overwhelming majority of prisoners, if for no other reason than their imprisonment, are indigent and the federal government would be expected to bear the costs. Even when a prisoner is represented by counsel in such a case, the relationship between the party and his attorney is such that counsel has less tactical control than in the ordinary civil litigation contemplated by the Committee on Rules, since many prisoners consider themselves well-versed in the law. Counsel does not have a financial interest in the outcome of the case and, indeed, he has not been personally hired by the petitioner in many cases. While petitioners frequently ask that they be represented by a different lawyer, assigned counsel are loath to ask that they be relieved even though the petitioners will not follow their advice in planning the course of litigation. Furthermore, petitioners frequently make motions and file

briefs which supplement the action of counsel. Therefore, the control by counsel is very little deterrence against the abuse of discovery in habeas corpus. A *pro se* petitioner, undeterred by counsel or the threat of costs, would be tempted to serve demands on all persons, public and private, with whom he has crossed paths or swords.

The greatest potential for the abuse of discovery in habeas corpus is the love of litigation for its own sake with which many prisoners are afflicted. Many commentators have remarked with amazement on this joy in adjudication. See e.g., *Diggs* v. *Welch*, 148 F. 2d 667, 669-70 (D. C. Cir. 1945); Carter, *Pre-trial Suggestions, supra.* It cannot be ignored in considering whether or not to allow discovery to parties in habeas corpus proceedings. It is understandable that an incarcerated person would be delighted by the prospect of requiring persons in authority to answer his questions and do his bidding, but this understandable predilection has already overwhelmed the District Courts. While in some respects the burgeoning of litigation is an unavoidable concomitant of providing a remedy for extraordinary abuse, it certainly is a factor to be considered before altering habeas corpus procedures. If discovery were essential to enable habeas corpus petitioners to vindicate their constitutional rights, the potential burden it would impose would diminish in importance, but when we consider the efficacy of using such a procedure, its susceptibility to abuse in a particular kind of action, is very significant.

It is no answer to the probability of abuse that protective orders could be obtained in order to prevent excessive examination (Rule 30[b] Federal Rules of Civil Procedure) for the burden is on respondent affirmatively to seek such protective orders. The burden on independent persons, possibly unrepresented by counsel, could be very disturbing. Finally, the tendency of Courts is to be skeptical about granting protective orders in light of the broad

purposes of discovery under the federal rules. 4 *Moore's Federal Practice, supra,* ¶ 30.06 at pp. 2044-48. It is interesting to note that in the *Report On Standards Relating To Post-Conviction Remedies* of the American Bar Association Project On Minimum Standards For Criminal Justice, *supra,* the discovery rule proposed requires that the discovery be made only with court authorization and subject to an affirmative showing of good cause by the parties seeking discovery. *Id.* at page 68. Certainly the obtaining of such orders would further burden and delay the proceeding.

At the very least, the substantial threat of abusive discovery procedures in habeas corpus proceedings mandates this kind of careful legislative consideration of discovery rules particularly applicable to such a proceeding if such legislative investigation reveals a necessity for their use at all.

The purpose of habeas corpus is to relieve unjust imprisonment. *Fay* v. *Noia, supra* at 402. The writ is, by definition, an extraordinary one and it must be processed with great speed. Congress has made the requirement of speed explicit. 28 U.S.C. § 2243. Even its heartiest supporters admit that discovery has created delay in disposing of the civil cases in which it is available. See e.g., 60 Yale Law Journal 1133, 1155, *The Use Of Discovery In United States District Courts,* Speck, William H.

In formulating the limited discovery in federal criminal cases, the Advisory Committee on Rules deliberately sought to prevent the delay ordinarily associated with discovery. Rule 16(F), Federal Rules of Criminal Procedure.

> "This subdivision is designed to encourage promptness in making discovery motions and to give the Court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of

discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause." *Id.* Notes of Advisory Committee.

The instant case presents an excellent example of the unnecessary time consumed by using discovery in habeas corpus cases. Counsel was appointed to represent Walker on March 16, 1966 in an order which indicated that a hearing might be necessary. On August 4, 1966 counsel moved for an order granting an evidentiary hearing and for a pre-trial conference. (App. 1, 8-32). On August 16, 1966, the Court granted the motion setting September 1 as the date for the pre-trial conference (App. 1, 33). Thereafter, the date of the hearing was set for October 28, 1966. On October 20, 1966, Walker's counsel served a set of interrogatories upon the respondent Warden (App. 1, 34-35). The next day respondent filed its objections thereto (App. 1, 36-38). That same day the Court denied the objections and ordered the interrogatories answered by October 26, 1968 (App. 1, 39). As of August 16, 1966 Walker had a right to an expeditious hearing on the merits of his claim. Any delay would be a deprivation of his freedom according to his own contentions. Yet he applied for a pre-trial conference, claiming that the issues to be heard were complex (App. 25), although on its face, it appears to be a limited contention which does not suggest the necessity of many witnesses—that the arresting officer proceeded on information from an informer not known to be reliable (App. 13). Nonetheless, the pre-trial conference was ordered.*

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* The question of whether or not a pre-trial conference under Rule 16 of the Federal Rules of Civil Procedure is available in habeas corpus is not presented by this case and we do not take any position on this question. Under the flexible habeas corpus procedure, it is beyond doubt that the Court can discuss the scope of a hearing with the parties or their counsel before it is held.

In civil cases, the use of discovery frequently precedes pre-trial conferences and assists in limiting the issues as defined in the pre-trial order. This would not necessarily be a salutory function in habeas corpus since such limitation would probably not be considered a "waiver" of future claims under the standards of *Fay* v. *Noia, supra* at 439. Thus, it could become a source of future objection to the nature of the habeas corpus hearing. Furthermore, a full adjudication of all federal claims on a petitioner's first application for habeas corpus relief has been mandated by Congress in its 1966 Amendment to the habeas corpus statute. 28 U.S.C. § 2253. That mandate requires that the first hearing be flexible in scope. While we acknowledge its benefits to ordinary civil litigation, the pre-trial conference certainly could be a procedural block to a speedy hearing in habeas corpus cases.

The instant case is an illustration. The hearing, instead of the pre-trial conference, could have been held on September 1.

The interrogatories in this case were served after the pre-trial conference and thus could not be used in that context. In any event, the hearing itself was set for October 28, 1966 and the first attempted use of discovery occurred merely seven days before, on October 21, 1966 (App. 1, 34-35). Respondent was ordered to answer the interrogatories two days before the hearing was to be held. Thus, it was for 1½ days of investigation that Walker resorted to discovery. Perhaps he would have had to apply for an adjournment to pursue the information received. Certainly it would have been more direct, efficient and expeditious to have scheduled an earlier hearing, had full examination and cross-examination of the arresting officer himself and then to have requested an adjournment and further cross-examination, if necessary.

We mean to impute no ulterior motive or purposeful delay to Walker or his counsel. We use this case solely to

demonstrate that the automatic application of the Federal Rules regarding discovery in habeas corpus cases results in delay in the adjudication of those cases and affords petitioners nothing that they would not be entitled to under the flexible procedures already in use in habeas corpus.

Of course, the instant case is not illustrative of the extreme procedural blockage which the availability of discovery under Rules might entail. The number of interrogatories and depositions is unlimited. Protective orders, orders to terminate or limit examination on each might be necessary. An excellent discussion of the kind of delay that can occur by reason of the use of discovery under the Rules is contained in the note at 59 Yale Law Journal 117ff. While the kind of purposeful delay which has sometimes occurred in civil litigation might not seem to be a rational tactic for a habeas corpus petitioner, if petitioners were given the opportunity to serve orders, get answers and even have protective motions made against them, many prisoners would enter the fray joyously. Contrary to the inherent deterrence which operates in ordinary civil litigation, the complicated procedures of discovery might be an attraction in and of themselves.

CONCLUSION

For the foregoing reasons and those presented by attorney for respondent, the California Attorney General, the decision of the Court below should be affirmed.

Dated: New York, New York, October 31, 1968

Respectfully submitted,

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